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Criminal Law, Criminal Procedure, and Habeas Corpus

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III. CRIMINAL LAW, CRIMINAL PROCEDURE, AND HABEAS CORPUS

During 1964 the Colorado Supreme Court decided over fifty cases dealing with criminal law, criminal procedure, and habeas corpus. No attempt is made herein to discuss each case; only those cases deemed significant warranted comment.

A. ACTS DONE SUBSEQUENT TO THE COMMISSION OF HOMICIDE NOT ADMISSIBLE TO SHOW PREMEDITATION AND DELIBERATION

In a 1964 homicide case, *Stafford v. People,* where deceased was killed by a blow from defendant's fist, it was held that the facts that defendant buried the body, repeatedly lied concerning the disappearance of the victim, went under an assumed name, and escaped from jail while awaiting trial were properly introduced as evidence of guilt but could not supply the missing element of malice.[1] It has been held a number of times in Colorado that a blow with the fist or open hand is not calculated to cause death, and malice or intent to kill cannot generally be implied because death resulted from the blow.[2]

The more difficult question for the court was whether malice could be implied from the acts of the accused subsequent to the killing. The court answered in the negative, relying on two North Carolina cases[3] which, in part, said flight and other acts showing guilt subsequent to the homicide were not proper as evidence of premeditation and deliberation.

There is a division of authority as to the propriety of allowing the jury to consider subsequent conduct as bearing on the issue of malice and premeditation. Most states seem to be in agreement that such evidence, in conjunction with the other circumstances of the crime, is admissible to show only state of mind and consciousness of guilt at the time of flight.[4] However, some jurisdictions allow

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[1] 388 P.2d 774 (Colo. 1964).

[2] McAndrews v. People, 71 Colo. 542, 208 Pac. 486 (1922); Murphy v. People, 9 Colo. 435, 13 Pac. 528 (1887). See, Annot., 22 A.L.R.2d 854 (1952) as to the inference of malice or intent to kill where killing is by blow without a weapon.

[3] State v. Steele, 190 N.C. 506, 130 S.E. 308 (1925); State v. Foster, 130 N.C. 666, 41 S.E. 384 (1902). See a more recent case holding the same but not cited in the Stafford opinion, State v. Blanks, 230 N.C. 501, 53 S.E.2d 452 (1949).

[4] *E.g.,* Green v. U.S., 259 F.2d 180 (D.C. Cir. 1958); State v. Golden, 67 Idaho 497, 186 P.2d 485 (1947); State v. Nelson, 65 N.M. 403, 338 P.2d 301 (1959); State v. Ross, 92 Ohio App. 29, 108 N.E.2d 77 (1952); see generally 2 WIGMORE, EVIDENCE § 276 (3rd ed. 1940). It is interesting to note that Colorado is one of the few jurisdictions where such evidence is not expressly permissible to prove the crime, but can only be used in corroboration of other evidence to show a guilty conscience. Bernard v. People, 124 Colo. 424, 238 P.2d 852 (1951); Kostal v. People, 144 Colo. 505, 357 P.2d 70 (1960) (Bernard v. People, *supra,* is cited with approval, but the court states the rule as being that such evidence is admissible as having a slight tendency to prove guilt).

such evidence to be used in determining malice, premeditation and deliberation.[5] Colorado, by the *Stafford* decision, is not in accord with this latter view.

B. FORMER JEOPARDY — MISTRIAL PROPER IN CASE TRIED BEFORE COURT WITHOUT A JURY

Colorado has, since 1958, held that jeopardy attaches in the prosecution of a criminal case which is tried to the court without a jury at that moment when the judge begins to hear the evidence.[6] In 1964 the Colorado Supreme Court held that there was no abuse of discretion by the trial court in granting a mistrial in a murder case tried without a jury when a state's witness, the defendant's husband, was stricken and died while testifying. The defendant was visibly disturbed, and the court, in granting a mistrial, acted within the bounds of its discretionary power.[7] Such declaration by the trial court precluded defendant from successfully pleading former jeopardy. The issue before the supreme court was whether there was legal justification to warrant the mistrial. The court relied upon language expressed in an earlier Colorado case tried before a jury, *Brown v. People*,[8] to substantiate its position. Essentially, a mistrial

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[5] Wahl v. State, 229 Ind. 521, 98 N.E.2d 671 (1951): "The jury had the right to consider all of the circumstances bearing upon the question of premeditated malice, regardless of whether the circumstances occurred before or after the homicide. . . ." State v. Staley, 56 S.D. 495, 229 N.W. 373 (1930): "If accused's conduct subsequent to the homicide is directly connected with and tends to prove a preconceived plan and its continued execution in which the homicide is but one of several acts planned it may then be shown to characterize the homicidal act as unlawful and a part of a premeditated criminal plan. . . ." Franks v. State, 187 Tenn. 174, 213 S.W.2d 105 (1948): "Any effort to conceal the crime on the part of the slayer is admissible as showing premeditation. . . ." Jones v. State, 153 Tex. Cr. App. 345, 220 S.W.2d 156 (1949): Acts of the accused immediately subsequent to the homicide admissible as showing malice. In State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938), the jury, in determining the question of premeditation and deliberation, could properly consider the accused's conduct after the homicide. The case seems contrary to the North Carolina position as expressed in prior and subsequent decisions, but the holding could be explained as pertaining only to conduct immediately following the death. The opinion gives no explanation of the apparent disparity.

[6] Markiewicz v. Black, 138 Colo. 138, 330 P.2d 539 (1958) (In a case submitted to the court without a jury, jeopardy begins after accused has been indicted, arraigned, has pleaded and the court has begun to hear the evidence).

[7] McCoy v. District Court, 397 P.2d 733 (Colo. 1964).

[8] 132 Colo. 561, 291 P.2d 680 (1955), which said that:

> To be legally justified there must be a reasonable objective sought and a substantial purpose attained. The granting of a mistrial would not be legally justified because of some whimsical notion or frivolous impulse, such as for instance, that some members of the jury dyed his hair or wore an artificial limb. While the cause for the order must be substantial and real, it need not be vital. It need only be such as could affect, or might in some way or manner be considered as interfering with, retarding, or influencing, to even a slight degree, the administration of honest, fair, even-handed justice to either, both, or any, of the parties to the proceeding . . . 132 Colo. at 561, 568-69.

is proper if there is a "reasonable objective sought" and a "substantial purpose attained."[9] In the instant case, the court felt the fair administration of justice was an objective necessitating a mistrial and that the cause for the order was "substantial and real."[10]

There is no express authority in Colorado warranting a mistrial when the court is acting as the trier of facts. Justice Frantz, strongly dissenting in this case, declared the majority holding contrary to all known authority and to the Colorado Constitution, Article 2, Section 18, which provides: ". . . nor shall any person be twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be arrested after the verdict, or if the judgment be reversed for error in law the accused shall not be deemed to have been in jeopardy."[11] The above excerpt from the Colorado Bill of Rights includes no language that could be interpreted as authority for holding that a mistrial granted in a case before a court without a jury precludes accused from claiming former jeopardy. Justice Frantz states: ". . . Indeed, mistrial and discharge of a jury are interchangeable judicial acts. I can conceive of no matter arising in the course of a trial to a court which would warrant that court to declare a mistrial. . . ."[12]

Mistrials will bar the defense of former jeopardy when the case is tried before a jury,[13] but there is apparently no authority in other jurisdictions for granting a mistrial when the case comes before the court presiding without a jury.[14] A proper course of action for the trial court would have been to continue the case for a reasonable period of time. The Supreme Court of Colorado clearly acted contrarily to the universally accepted view restricting mistrials to jury cases in affirming the lower court's procedure.

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[9] *Id.* at 568.

[10] McCoy v. District Court, 397 P.2d 733, 735 (Colo. 1964).

[11] *Id.* at 736.

[12] *Ibid.*

[13] Brown v. People, 132 Colo. 561, 567, 291 P.2d 680, 684 (1955).

[14] *E.g.,* Fisk v. Henarie, 32 Fed. 417, 427 (9th Cir. 1887), "Where a jury is discharged without a verdict, the proceeding is properly known as a mistrial. . . ."; State v. Patterson, 64 Ariz. 40, 165 P.2d 309 (1946); Curley v. Boston Herald-Traveler Corp., 314 Mass. 31, 49 N.E.2d 445, 446 (1943), which held that, "A mistrial is declared because of some circumstances indicating that justice may not be done if the trial continues, and it results only in the discharge of the jury and the impanelling of another jury to try the case anew. . . ."; Clark v. State, 170 Tenn. 484, 97 S.W.2d 644, 646 (1936), wherein the court stated that, "The term 'mistrial' is aptly applied to a case in which a jury is discharged without a verdict. . . ." See generally, 27 WORDS AND PHRASES, *Mistrial* 620 (Perm. ed. 1961).

C. TRIAL COURT PROPER FORUM TO REQUEST ATTORNEYS' FEES FOR PROSECUTING A WRIT OF ERROR ON BEHALF OF AN INDIGENT

In *Corbett v. People,* [15] the supreme court held that the trial court was the proper forum in which to request attorneys' fees and out-of-pocket expenditures for prosecuting a writ of error on behalf of an indigent criminal defendant.

This was the first time that such a request had been made in the trial court. To substantiate its position, the high court relied upon an analogous principle which says the trial court is the proper forum in which an indigent would request aid of counsel to sue out a writ of error.

D. (1) PLEA OF GUILTY CANNOT BE WITHDRAWN AFTER THE SENTENCE HAS BEEN IMPOSED.

(2) IT IS PROPER FOR THE DISTRICT ATTORNEY TO EXPLAIN TO ACCUSED CONSEQUENCES OF A PLEA OF GUILTY.

Pursuant to Rules 32(e) and 37(d) of the Colorado Rules of Criminal Procedure, the supreme court held that a motion to withdraw a plea of guilty to the crime of taking indecent liberties with the person of a child, made after the sentence was imposed, was properly denied.[17] Rule 32(e) provides: "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended." Rule 37(d) states: "No writ of error on behalf of the defendant shall lie to a judgment based upon a plea of guilty or nolo contedere, ..." Rule 32(d) of the Federal Rules of Criminal Procedure is the counterpart of Rule 32(e). The court, at the time of promulgating the Colorado rules, purposely deleted that portion of Rule 32(d) which says: ". . . but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Justice Moore, writing for the court in 1964, stated:

> Omission of the last quoted clause from Rule 32(e) of the Colorado Rules of Criminal Procedure was not an oversight on the part of this court. The committee of lawyers who served in preparation of the original draft of proposed Rules of Criminal Procedure included the language above quoted from Federal Rule 32(d). This court purposely deleted it from the rule to be followed in this jurisdiction.[18]

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[15] 389 P.2d 853 (Colo. 1964).

[16] *In re* Pigg's Petition, 384 P.2d 267 (Colo. 1963); *In re* Griffin's Petition, 382 P.2d 202 (Colo. 1963).

[17] Glaser v. People, 395 P.2d 461 (Colo. 1964).

[18] *Id.* at 462.

Whether a plea of guilty can be withdrawn after the sentence has been imposed is a much debated question.[19] In absence of a statutory provision to the contrary, whether to allow or refuse the withdrawal after sentence has been imposed lies within the sound discretion of the court.[20] In a few states where statutes explicitly permit withdrawal of a guilty plea before sentence, the statutes are so construed as to prohibit a withdrawal after sentence has been imposed.[21] In other states with like statutes, either requiring or permitting withdrawal before imposition of sentence, the above-mentioned rule of discretion is followed and is in accord with federal practice ("to correct manifest injustice"),[22] and with procedure in a majority of the states.[23] Colorado is in the minority in absolutely prohibiting the withdrawal of a guilty plea after sentence has been imposed.

In another 1964 case, the question arose as to who explains to a defendant the consequences of a plea of guilty. Section 39-7-8 of the Colorado Revised Statutes[25] contains the following language: "In all cases where the party indicted shall plead guilty, such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering such plea. . . ." In this case, the district attorney, acting under the court's direction, made the necessary explanation to the accused, and the court accepted the plea of guilty to the crime of indecent liberties; the supreme court affirmed the judgment, declaring that the acceptance of the plea did not violate any of defendant's constitutional rights.[26] The court reasoned that the above-mentioned statute does not require the judge to make the explanation; the obvious meaning is that the rights of the defendant must be protected pursuant to the court's sound discre-

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[19] *E.g.*, Myers v. State, 115 Ind. 554, 18 N.E. 42 (1888); State v. Olson, 115 Minn. 153, 131 N.W. 1084 (1911). Curran v. State, 53 Ore. 154, 99 Pac. 420 (1909); See also, Annot., 99 L. Ed. 217 (1955); 4 ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 1909 (1957).

[20] *E.g.*, Smith v. U.S., 324 F.2d 436 (D.C. Cir. 1963); Sands v. State, 126 So. 2d 741 (Fla. 1961); Fair v. Balkcom, 216 Ga. 721, 119 S.E.2d 691 (1961); State v. Plum, 14 Utah 2d 124, 378 P.2d 671 (1963); Pulaski v. State, 23 Wis. 2d 138, 126 N.W.2d 625 (1964).

[21] State v. Telavera, 76 Ariz. 183, 261 P.2d 997 (1953); State v. Rinehart, 255 Iowa 1132, 125 N.W.2d 242 (1963); State v. Scott, 101 Wash. 199, 172 Pac. 234 (1918).

[22] FED. R. CIV. P. 32(d).

[23] *E.g.*, Holston v. State, 103 Ga. App. 373, 119 S.E.2d 302 (1961); State v. Raponi, 32 Idaho 368, 182 Pac. 855 (1919); Clift v. Commonwealth, 268 Ky. 573, 195 S.W.2d 557 (1937); State v. District Court, 81 Mont. 495, 263 Pac. 979 (1928); People v. Longe, 269 App. Div. 474, 57 N.Y.S.2d 337 (1945); Gist v. State, 278 P.2d 250 (Okla. 1954).

[24] See generally, 22 C.J.S. *Criminal Law* § 421(4) (1961).

[25] The court refers to the 1953 COLO. REV. STAT. § 39-7-8, which is identical in the 1953 and 1963 editions of the statutes.

[26] Kephart v. People, 395 P.2d 7 (Colo. 1964).

tion. In this instance the district attorney warned the accused of the consequences of pleading guilty, advised him his right to counsel, explained the nature of the charge, and advised him of his right to a jury trial. There was no denial of due process.[27]

There have been a number of other Colorado cases interpreting section 39-7-8, Colorado Revised Statutes, in such a liberal fashion, but they have dealt with the situations wherein his own *counsel* has advised defendant of the consequences of pleading guilty and the trial court has inquired into the adequacy of counsel's explanation of defendant's rights.[28] The *Kephart* case of 1964 is the first in which the statute has been construed so as to allow the district attorney to make this important explanation.

While the rule is not universal, especially as to misdemeanor cases, it is generally recognized that when one pleads guilty to a criminal charge, the court must inform the accused of his rights and the significance of his decision.[29] There are many cases in other jurisdictions where, under analogous circumstances, the accused had been held to have been sufficiently advised by the court.[30] Research has found no case in any jurisdiction prior to *Kephart* wherein accused has been advised of his rights by a district attorney.

E. Retrial in a First Degree Murder Case Must Be on the Issues of Both Guilt and Punishment.

In *Jones v. People*,[31] the court held that issues of guilt and punishment in a first degree murder case must be resolved by the jury in a unitary fashion. The defendant had two trials. He had been convicted of first degree murder and sentenced to death in 1960, but that judgment was reversed in 1961 and the case remanded

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[27] *Id.* at 9.

[28] *E.g.*, Marler v. People, 139 Colo. 23, 336 P.2d 101 (1959); Glass v. People, 127 Colo. 210, 255 P.2d 738 (1953).

[29] *E.g.*, Rowe v. U.S., 227 F. Supp. 666 (W.D. Wis. 1964); Martinez v. People, 152 Colo. 521, 382 P.2d 990 (1963); Adams v. State, 224 Md. 141, 167 A.2d 94 (1961); State v. Jones, 267 Minn. 421, 127 N.W.2d 153 (1964).

[30] *E.g.*, People v. Emigh, 174 Cal. App. 2d 392, 344 P.2d 851 (1959); (Defendant deemed sufficiently informed of rights when represented by court-appointed attorney); Gladden v. State, 227 Md. 266, 176 A.2d 219 (1961) (Record discloses that defendant specifically requested that no counsel be appointed and that judge informed defendant of his plea); Brown v. State, 223 Md. 401, 164 A.2d 722 (1960) (Court and counsel advised defendant as to his rights and the consequences of his plea); Jones v. State, 221 Md. 141, 156 A.2d 421 (1959) (Counsel and court fully explained the consequences of pleading guilty); State v. Wall, 36 N.J. 216, 176 A.2d 8 (1961) (Though technical meaning of *non vult* not explained to accused, consequences of plea were fully explained by counsel and the court); People v. Serrano, 20 App. Div. 2d 777, 247 N.Y.S.2d 749 (1964) (Plea of guilty to murder in second degree allowed to stand, though the court, prior to plea, elicited information from defendant indicating a killing in the heat of passion.).

[31] 393 P.2d 366 (Colo. 1964).

for a new trial because evidence of mitigating circumstances was denied admission.[32] At the subsequent trial the extent of punishment was the sole issue determined by the jury. Upon a sentence of death, defendant once again appealed. Now the court has declared that where a sentence of death for first degree murder was reversed and the case remanded for new trial because the defendant was erroneously prohibited from introducing evidence of mitigating cirumstances, a retrial on the issues of *both* guilt and punishment was necessary.[33]

In arriving at its decision, the majority pointed out that Section 40-2-1, Colorado Revised Statutes, which defines homicide and its modes of commission, and Section 40-2-20, which provides that once the killing has been proved the burden is upon the accused to prove circumstances of mitigation, have long been construed in relation to each other.[34] The court went further, stating that section 40-2-3, Colorado Revised Statutes, which provides, in part, that a jury deciding guilt in a first degree murder case shall also fix the penalty, must be construed in connection with sections 40-2-1 and 40-2-20 and must be a unitary action on the part of one jury.[35]

The court said that it was powerless, pursuant to section 40-2-3, to remand the case only on the issue of punishment; that a judicial amendment of a legislative act is clearly improper,[36] as also is attributing to a statute a legislative intent which is inconsistent with the plain and literal meaning of the statute.[37]

Pringle, J., and Moore, J., dissented,[38] Justice Moore stating in his opinion that the procedure followed by the lower court in the second trial was proper due to the fact that no defense to the murder was presented at either trial and the only issue remaining upon remand of the case was the extent of the punishment to be prescribed.[39] Two factors were most persuasive in guiding the dissenters: (1) The evidence prohibited in the first trial, which gave rise to the error, was not presented to the jury in the second trial; (2) a

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[32] Jones v. People, 146 Colo. 40, 360 P.2d 686 (1961).

[33] 393 P.2d at 368.

[34] Kent v. People, 8 Colo. 563, 9 Pac. 852 (1886).

[35] To the effect that a jury selected pursuant to law which finds a defendant guilty of murder must also fix the penalty, see, People v. Hall, 199 Cal. 451, 249 Pac. 859 (1926) (but, if jury silent as to punishment, death penalty inferred); Shank v. People, 79 Colo. 576, 247 Pac. 559 (1926); Demato v. People, 49 Colo. 147, 111 Pac. 703 (1910); People v. Hicks, 287 N.Y. 165, 38 N.E.2d 482 (1941).

[36] Farmers' Irr. Co. v. Kamm, 55 Colo. 440, 135 Pac. 766 (1913).

[37] Isaak v. Perry, 118 Colo. 93, 193 P.2d 269 (1948).

[38] 393 P.2d at 370.

[39] *Ibid.*

Maryland case, *Brady v. State*,[40] wherein the procedure followed by the trial court upon the second trial was identical with that in the instant case, the pertinent provisions of a Maryland statute being the same as Colorado's.[41] *Jones* presents a stronger case than *Brady* for remand on the issue of punishment only, because in the latter case there was also disagreement as to whether the prohibited evidence went not only to the matter of punishment but even to that of guilt.

It is not uncommon for states to allow juries, pursuant to constitutional provisions or statutes, to assess the extent of punishment to be administered in a first degree murder case; however, for lesser offenses the court usually assesses punishment pursuant to statute,[42] and, as a general rule, when a new trial is ordered before a jury, the parties are put in the same position as though the case had never before been heard.[43] *Jones* demonstrates that Colorado adheres to the general view; the dissent presents the theory that an exception can reasonably be made when the jury in the first trial has, without error, passed on the issue of guilt and there remains to be decided at the second trial only the extent of the punishment to be administered.

F. One Convicted of a Criminal Offense Cannot Be Subjected to Body Execution in a Civil Action for the Same Wrong.

Section 77-9-3 of the Colorado Revised Statutes and Rule 101(a) of the Colorado Rules of Civil Procedure provide that a person convicted of a criminal offense cannot be subjected to body execution in a civil action for the same offense;[44] proper construction of the appropriate passages indicates, however, that acquittal of the criminal charge prohibits a claim of immunity from body execution.[45] The defendants in *Boyer v. Elkins*[46] were acquitted of the criminal

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[40] 226 Md. 422, 174 A.2d 167 (1961), *aff'd*, Brady v. Maryland, 373 U.S. 83 (1963).

[41] Annot. Code of Md. art. 27, § 413 (1957).

[42] *E.g.*, People v. Lane, 16 Cal. Rptr. 801, 336 P.2d 57 (1961); State v. Maxey, 42 N.J. 62, 198 A.2d 768 (1964); Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963); State v. Sayward, 63 Wash. 2d 485, 387 P.2d 746 (1963).

[43] *E.g.*, State v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931); Hobbs v. State, 231 Md. 533, 191 A.2d 238 (1963); Duncan v. State, 41 Okl. Cr. 89, 270 Pac. 335 (1928) (Statute which provides that granting a new trial places parties in the same position as though no trial had been had is constitutional.).

[44] Colo. Rev. Stat. § 77-9-3 (1963) provides that: "In no case shall an execution issue against the body of a person when the person shall have been convicted in a criminal prosecution for the same wrong." Colo. R. Civ. P. 101(a) (1963) states: "[I]n no case shall such execution issue when the defendant shall have been convicted in a criminal prosecution for the same wrong."

[45] Boyer v. Elkins, 390 P.2d 460 (Colo. 1964).

[46] *Ibid.*

charge of assault and battery but were subsequently subjected to body execution pursuant to civil litigation of the same matter. The supreme court held that the distinction made between one convicted of a criminal offense and one acquitted of the criminal offense was reasonable and did not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution; therefore, body execution could proceed.[47]

Relying on an earlier Colorado case,[48] the court said that the classification is reasonably related to the lawful purpose of the act, i.e., that one convicted of a criminal charge should not be required to suffer a second punishment. In *Kennedy v. Simansky*,[49] the court would not allow a body execution against one found guilty of assault and battery in a civil action when, in an earlier criminal prosecution, he had been merely *fined* for the same assault.

It is apparent that Colorado is the only state allowing body executions which has declared that one previously convicted in a criminal prosecution for the same wrong shall not be subject to subsequent body execution.[50] Various classes of persons have been held to be exempt from arrest and imprisonment on execution against the person,[51] but it seems that no other jurisdiction would exempt the judgment debtor who was previously prosecuted in a criminal action for the same wrong. On the contrary, it would seem that body executions initiated in a civil proceeding, but subsequent to criminal prosecution for the same wrong, are commonplace outside Colorado.[52]

G. THE RIGHT OF COUNSEL SHALL HAVE NO RETROSPECTIVE AFFECT IN COLORADO. THIS RULING SUBSEQUENTLY REVERSED BY THE UNITED STATES SUPREME COURT.

In *Arthur v. People*,[53] the court stated that the now-existing requirement that accused persons shall be advised concerning their right to counsel and offered assistance of counsel would not be given

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[47] *Id.* at 465.

[48] Grant v. Gwyn, 148 Colo. 56, 365 P.2d 256 (1961). In this case defendant was convicted of a criminal offense and subsequently declared immune from body execution pursuant to an adverse civil verdict on the same incident.

[49] 75 Colo. 103, 224 Pac. 233 (1924).

[50] *Id.*; Grant v. Gwyn, 365 P.2d 256 (Colo. 1961).

[51] *E.g.*, Swift v. Chamberlain, 3 Conn. 537 (1821) (electors while going to or returning from the polls); Brazill v. Green, 137 N.E. 346, 243 Mass. 252 (1922) (officer of the court if engaged in official duties); Bush v. Pettibone, 4 N.Y. 300 (1850) (idiots, lunatics or infants); Harrison v. Caudle, 141 S.C. 407, 139 S.E. 842 (1927) (females exempt).

[52] See 33 C.J.S. *Executions* § 413c (1942).

[53] 393 P.2d 371 (Colo. 1964).

retrospective effect. Defendant was convicted of forcible rape in 1956, and the court, in the present case, felt that failure to advise accused of right of counsel or failure to offer assistance of counsel was not a violation of due process pursuant to state or federal law at the time of the 1956 conviction.[54] Recognizing that the United States Supreme Court has brought about a change in the law,[55] the court would not believe it was the intention of the Supreme Court to apply the present law retrospectively.[56] However, in *Arthur v. Colorado*,[57] a per curiam opinion, the Supreme Court reversed the Colorado decision.

In *Gideon v. Wainwright*,[58] the Supreme Court said nothing as to the retrospectivity of the newly-promulgated rule. The ruling, however, had been applied retrospectively prior to the *Arthur* case in another per curiam opinion by the Supreme Court.[59] Whether to apply a new ruling retrospectively has always been a difficult question for the courts,[60] but there is already abundant commentary to the effect that *Gideon* should apply retrospectively.[61] It is unfortunate the Supreme Court has chosen to deal with the issue summarily.

H. Forfeiture of Appearance Bond Usually Final if Defendant Apprehended by the State Without Assistance from the Surety

One interesting bail case came before the supreme court in 1964, *People v. Johnson*.[62] The court held that where, after forfeiture of the appearance bond, the defendant is apprehended by the state without assistance from the surety, judgment should be entered

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[54] The leading Colorado case on the subject at that time was Kelley v. People, 120 Colo. 1, 206 P.2d 337 (1949). See also Rules 11(a) and 44 (as amended) of the Colorado Rules of Criminal Procedure, requiring that persons accused shall be advised concerning their right to counsel and offered assistance of counsel if indigent. Such requirement was nonexistent when the defendant was convicted. See also Bute v. Illinois, 333 U.S. 640 (1948), which the court relied on in deciding the Kelley case, as authority for the proposition that federal and state due process are not necessarily identical in comparable cases concerning right of counsel in criminal adjudications.

[55] Gideon v. Wainwright, 372 U.S. 335 (1963).

[56] 393 P.2d at 375.

[57] 85 Sup. Ct. 943 (1965).

[58] 372 U.S. 335 (1963).

[59] Pickelsmer v. Wainwright, 84 Sup. Ct. 80 (1964).

[60] *E.g.*, United States v. Walker, 323 F.2d 11 (5th Cir. 1963).

[61] See concurring opinion of Judge Sobeloff in Jones v. Cunningham, 319 F.2d 1, 4-5 (4th Cir. 1963), arguing that *Gideon* does apply restrospectively. For a strong moral and legal argument advocating applying Gideon retrospectively, see Tucker, *The Supreme Court and the Indigent Defendant*, 37 So. Cal. L. Rev. 151, 177-178 (1964). See generally, 37 U. Colo. L. Rev. 144 (1964); Showalter, *Right to Counsel — Retroactive Application of Gideon Rule*, 36 U. Colo. L. Rev. 578 (1964).

[62] People v. Johnson, 395 P.2d 19 (Colo. 1964).

against the surety for the penal amount of the bond, unless the court sees fit to order a lesser amount, under no circumstances to be less than the costs necessitated by defendant's failure to appear.

The surety is afforded protection pursuant to statute,[63] either before or after forfeiture,[64] if he returns the defendant himself. The court felt the clear intent of the statute was not to afford a surety such protection, unless the trial court in the exercise of its sound discretion thought otherwise, when the defendant was apprehended without the aid of the surety. The court adopted appropriate language stated in a New York opinion, *People v. Fiannaca,*[65] to the effect that sureties, in most cases, would be held strictly liable for the penal amount of the bond upon the disappearance of their principals. The New York court in the *Fiannaca* case based its reasoning on the earlier case of *People v. Schwaize,*[66] where it had said: ". . . Justice may be defeated by the escape of the principal, and, if it is clearly understood that the bondsman will be held rigidly accountable for the escape, the administration of the criminal law will be promoted. . . ."[67]

In the absence of statutes to the contrary, sureties are generally not discharged by any event occurring after forefiture of the bond.[68] There are, however, instances when relief will be granted (absent a statute to the contrary) if the default was excusable and the state has lost no rights against the accused.[69] If the state will allow remittance after forfeiture, it is usually only when the accused appears

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[63] COLO. REV. STAT. § 39-2-18 (1963) provides:

> In all cases of bail for the appearance of any person charged with any criminal offense, the sureties of such person at any time before judgment is rendered, upon scire facias to show cause why execution should not issue against such sureties, may seize and surrender such person to the sheriff of the county wherein the recognizance shall be taken, and it shall be the duty of such sheriff, on such surrender and delivery to him of a certified copy of the recognizance by which such sureties are bound, to take such person into custody, and by writing acknowledge such surrender, and thereupon the sureties shall be discharged from any such recognizance, upon payment of all costs occasioned thereby.

[64] Van Gilder v. Denver, 104 Colo. 76, 89 P.2d 529 (1939), where the court held that a surety on a criminal recognizance may be released from liability thereon by the surrender of the defendant, even after forfeiture and judgment against him on the bond, if he acts before final disposition of the case, extending to a review on error.

[65] 306 N.Y. 513, 119 N.E.2d 363 (1954).

[66] 168 App. Div. 124, 153 N.Y.S. 111 (1915).

[67] *Id.* at 126.

[68] *E.g.,* United States v. Copua, 94 F.2d 292 (7th Cir. 1938); United States v. Russo, 7 F. Supp. 391 (E.D.N.Y. 1934). *But see,* Annot., 84 A.L.R. 416, 422 (1933) as to the inherent power of the court to relieve bail-bondsman from forfeiture of his bond.

[69] See generally, 8 C.J.S. *Bail* § 92(a) (1962).

on his own volition[70] or surrenders through his surety.[71] The last-mentioned contingency is imposed by statute in Colorado.[72] The *Johnson* opinion, however, indicates that the trial court is allowed to exercise its sound discretion in the matter. The prevailing view is that sureties cannot, as a matter of right under the statutes, redeem themselves by surrendering the principal after forfeiture, and are not released by the subsequent voluntary appearance of the accused;[73] the court may, however, refuse or grant the remittance, in whole or in part, pursuant to its discretion.[74]

I. (1) AUTHORITY OF STATE BOARD OF PAROLE IS NOT LIMITED TO PERSONS CONVICTED AND SENTENCED TO PRISON SUBSEQUENT TO CREATION OF THE BOARD.

(2) MEANS OF PAROLE DO NOT INCLUDE EXECUTIVE COMMUTATION AND RELEASE OF PRISONER TO FEDERAL JURISDICTION.

A habeas corpus petition failed because the authority of the State Board of Parole is not limited merely to persons who have been convicted and sentenced to prison subsequent to the legislature's creation of the board.[75] The petitioner was convicted and sentenced prior to the statutory establishment of the Board of Parole. He was paroled by the board. The subsequent revocation of his parole gave rise to the habeas corpus proceeding. The supreme court held that section 39-18-1 of the Colorado Revised Statutes[76] (which deals with parole regulations) was not an ex post facto law. The court dismissed petitioner's contention that the board could not revoke his

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[70] General Cas. Co. of America v. State, 229 Ark. 485, 316 S.W.2d 704 (1958); Edwards v. State, 321 P.2d 955 (Okla. 1958). *But see,* Van Gilder v. People, 75 Colo. 515, 227 Pac. 386 (1924) (The appearance for trial of the defendant in a criminal case is not equivalent to a surrender of his person by a surety on his bond.).

[71] United States v. Rutherford, 59 F.2d 1027 (3d Cir. 1932); Weber v. United States, 32 F.2d 110 (8th Cir. 1929); Southard v. People, 74 Colo. 67, 219 Pac. 218 (1923); State v. Arioso, 207 Iowa 1109, 224 N.W. 56 (1929); Bruntlett v. Carroll County, 193 Iowa 875, 188 N.W. 142 (1922); Commonwealth v. Grady, 236 Ky. 98, 32 S.W.2d 720 (1930); Speight v. Porter, 2 La. App. 597 (1925); State v. Hinojosa, 364 Mo. 1039, 271 S.W.2d 522 (1954).

[72] COLO. REV. STAT. § 39-2-18 (1963). See note 62, *supra.*

[73] United States v. Levine, 1 F. Supp. 104 (E.D.N.Y. 1932); Hickey v. State, 150 Ark. 304, 234 S.W. 168 (1921); People v. Durbin, 32 Cal. Rptr. 569, 218 Cal. App. 2d 886 (1963); People v. Simon, 244 Ill. App. 484 (1927); State v. Shell, 242 Iowa 260, 45 N.W.2d 851 (1950); People v. Continental Cas. Co., 301 N.Y. 79, 92 N.E.2d 898 (1950); State v. Jimas, 166 Wash. 356, 7 P.2d 15 (1933).

[74] *E.g.,* United Benefit Fire Ins. Co. v. United States, 306 F.2d 325 (9th Cir. 1962); People v. Durbin, 32 Cal. Rptr. 569, 218 Cal. App. 2d 886 (1963); State v. Fedrico, 82 N.H. 258, 132 Atl. 679 (1926). See generally, Annot., 84 A.L.R. 416, 424 (1933).

[75] Coleman v. Tinsley, 393 P.2d 739 (Colo. 1964).

[76] The court refers to the 1953 COLO. REV. STAT.; § 39-18-1 is § 39-18-4 in the 1963 edition of the statutes.

parole, stating that if the act creating the board was invalid, the board had no right to grant a petitioner's parole in the first place. Petitioner could not enjoy the benefits of a parole system and then disclaim it when he violated its provisions.

Both the Colorado and the United States constitutions prohibit the passing of ex post facto laws.[77] Colorado has interpreted this prohibition[78] in a manner consistent with the leading United States Supreme Court case, *Calder v. Bull.*[79] Since *Calder,* it has been understood that the interdict against ex post facto laws does not apply to civil statutes.[80] An ex post facto law within the constitutional prohibition must be one which imposes punishment for an act which was not punishable when it was committed, imposes additional punishment, or alters the situation of the accused to his disadvantage.[81]

Thus, the key factor in determining whether a statute is an ex post facto law is whether it works to the disadvantage of the accused, changing punishment or increasing it beyond that annexed to the crime when committed. Parole regulations, clearly, were promulgated for the benefit of those incarcerated in state penal institutions and not designed to work a hardship on the inmates

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[77] U.S. CONST. art. I, §§ 9,10 "No . . . ex post facto law shall be passed." "No State shall . . . pass any . . . ex post facto Law. . . ."; COLO. CONST. art. 2, § 11. "No ex post facto law . . . shall be passed by the general assembly."

[78] Garvey v. People, 6 Colo. 559, 45 Am. Rep. 531 (1883).

[79] 3 U.S. (3 Dall.) 386 (1798). Justice Chase wrote:

> I will state what I consider *ex post facto* laws within the words and the intent of the prohibition.
>
> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.
>
> 2d. Every law that aggravates a crime and makes it greater than it was when committed.
>
> 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.
>
> 4th. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender.

[80] See generally, 16A C.J.S. *Constitutional Law* §§ 435-438 (1956).

[81] Andrus v. McCauley, 21 F. Supp. 70 (E.D. Wash. 1936). See, *e.g.,* Graham v. Thompson, 246 F.2d 805 (10th Cir. 1957) (An ex post facto law is a law that changes punishment and inflicts greater punishment than the law annexed to the crime when committed); United States v. Papworth, 156 F. Supp. 842 (N.D. Tex. 1957) (This clause precludes retroactive application of any substantive statute that increases punishment or changes ingredients of offense between time of its commission and time of trial); Barton v. State, 81 Ga. App. 810, 60 S.E.2d 173 (1950) (The application of a subsequent reduction of the penalty only to cases arising after the enactment thereof does not raise the question of ex post facto legislation, because ex post facto law prohibited by this clause refers only to laws which aggravate the crime, increase the punishment, or allow conviction on a less or different weight of evidence, and not to those which reduce or modify the penalty); Commonwealth *ex rel.* Wall v. Smith, 345 Pa. 512, 29 A.2d 912 (1942) (An ex post facto law within the constitutional prohibition against enactment of ex post facto law is one which makes a crime of an act which when committed was not a crime or a law which increases the punishment for an act already committed).

therein. That a statute applies retrospectively does not necessarily mean that it is an ex post facto law within the meaning of the state and federal prohibition.[82] In *Kolkman v. People,*[83] the Colorado court cites with approval *Beazell v. Ohio,*[84] to the effect that the intent of the prohibition is ". . . to secure substantial personal rights against arbitrary and oppressive legislation, . . . and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance, ..."[85]

In another case of interest, the district court was held to have erred in not issuing a writ of habeas corpus and in failing to grant a hearing to a prisoner who alleged that he was not on parole, but that his Colorado sentence was commuted by the governor for the purpose of release to a federal court, and who further alleged that he had been erroneously ordered by a Colorado supervisor of parole to report to the parole office in Denver.[86] The order of release did not constitute a parole, and at no time did petitioner agree to the conditions of parole. The inference clearly is that section 39-18-1 of the Colorado Revised Statutes[87] does not include executive commutation and release to federal jurisdiction as a means of parole from the state penitentiary.

Gerald W. Wischmeyer

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[82] Satterlee v. Mathewson, 27 U.S. (2 Pet.) 410 (1829) (Retrospective laws which do not impair the obligation of contracts or partake of the character of ex post facto laws are not condemned or forbidden by any part of the Constitution.).

[83] 89 Colo. 8, 300 Pac. 575 (1931).

[84] 269 U.S. 167 (1925).

[85] *Id.* at 171.

[86] Espinoza v. Tinsley, 390 P.2d 941 (Colo. 1964).

[87] The court refers to the 1953 COLO. REV. STAT.; 39-18-1 is 39-18-4 in the 1963 edition of the statutes.

IV. DOMESTIC RELATIONS

A. (1) FATHER WHO, WITHOUT FAULT, IS DELINQUENT IN CHILD SUPPORT PAYMENTS, CANNOT BE DENIED VISITATION RIGHTS AS PUNISHMENT FOR DEFAULT.

(2) TRIAL COURT MAY ORDER PSYCHIATRIC EXAMINATION OF PARTIES IN A DOMESTIC RELATIONS CASE THOUGH COLO. R. CIV. P. 35(a) DOES NOT SPECIFICALLY SO PROVIDE.

The court's decision in *Kane v. Kane*[1] involved holdings on several different points, two of which are of significance. The first involves enforcement of an order to pay child support. A father had been ordered to pay $460.00 per month child support, and he had asked for a stay of execution of that order on the grounds that his net income was only $500.00 per month. The wife had asked that the father be denied visitation rights until he became current in his child support payments. The supreme court granted the stay of execution and ordered interim payments of $200.00 per month pending resolution of the issue. Then, citing no authority, the court held that a husband cannot be punished by denying him visitation rights until he becomes current in his payments. Colorado thus joins a number of other jurisdictions wherein this rule has been expressed.[2]

The general philosophy underlying such a rule is usually said to be that children are entitled to the love and companionship of both their parents, insofar as that is possible and consistent with their welfare; a parent whose child is placed in the custody of another person has a right of visitation with the child at reasonable times.[3] It is only where the best interests of the child[4] indicate otherwise that the father should be denied the right of visitation.[5] Thus visitation rights and duty to pay support may be said to be independent of

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[1] 391 P.2d 361 (Colo. 1964).

[2] *E.g.*, Fitch v. Fitch, 207 Iowa 1193, 224 N.W. 503 (1929); Gibford v. Gibford, 55 Wash. 2d 760, 350 P.2d 158 (1960); Block v. Block, 15 Wis. 2d 291, 112 N.W.2d 923 (1961). *Cf.* Weiner v. Weiner, 149 N.Y.S.2d 362 (Sup. Ct. 1956). *Contra,* Barbour v. Barbour, 134 Mont. 317, 330 P.2d 1093 (1958) (accompanied by a strong dissent in favor of the rule adopted by Colorado).

[3] See generally 2 NELSON, DIVORCE § 15.26 (1961).

[4] Searle v. Searle, 115 Colo. 266, 272, 172 P.2d 837, 840 (1946), cites with approval this definition from Brock v. Brock, 123 Wash. 450, 212 Pac. 550, 551 (1923):

> In determining what is best for the welfare of the child of tender years, the court must consider not only the food, clothing, shelter, care, education and environment, but also must bear in mind that every such child is entitled to the love, nurture, advice and training of both mother and father, and to deny the child an opportunity to know, associate with, love and be loved by either parent, may be a more serious ill than to refuse it in some part those things which money can buy.

[5] Grosso v. Grosso, 149 Colo. 183, 368 P.2d 561 (1962); Strakosch v. Benwell, 135 Colo. 317, 310 P.2d 720 (1957); Fitch v. Fitch, 207 Iowa 1193, 224 N.W. 503 (1929); Syas v. Syas, 105 Neb. 533, 34 N.W.2d 884 (1948).

each other,[6] with the welfare of the child the paramount consideration at all times.[7] Careful note should be taken, however, of the limiting words "through no fault of his own"[8] which the court used in connection with the husband who is delinquent in support payments. The limiting words probably mean that before applying this rule a court should require a husband to show that his delinquency resulted from a bona fide financial inability to pay and not from mere negligence or stubbornness or any other improper motive. Of course, orders restricting or modifying the right of visitation are within the discretion of the court.[9]

Compliance with orders of a court respecting alimony and support may be enforced by contempt proceedings[10] and may include imprisonment.[11] Because contempt proceedings are elastic, other remedies may be available where support money has not been paid, but denial of visitation should not be so used. The best reasoning behind not restricting visitation rights as a punishment for nonsupport is found in the principal case.

> We can conceive of no greater cause for disharmony in human or family relationships than the application of such vindictive rules. And, we can conceive of nothing more apt to make a father stubborn to the point of contempt of abandonment than this application.[12]

The *Kane* opinion also produced the court's clearest statement confirming a trial court's power to order psychiatric examination of parties in a domestic relations case, though such an examination is not, said the court, specifically provided for in Colorado Rules of Civil Procedure 35(a).[13] It is true that the rule does not specifically provide that such an examination can be ordered in a domestic relations case, but it expresses no limitation as to the type of action to which it may be applied;[14] nor must the mental condition be directly in controversy in order to employ its provisions.[15] The prevailing view, in line with a philosophy of liberal construction of the

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[6] *In re* Dublin, 201 Wis. 621, 112 N.Y.S.2d 267 (1952).

[7] Lear v. Lear, 29 Wash. 692, 189 P.2d 237 (1948).

[8] Kane v. Kane, 391 P.2d 361, 363 (Colo. 1964).

[9] Hayes v. Hayes, 134 Colo. 315, 303 P.2d 238 (1956); Bird v. Bird, 132 Colo. 116, 285 P.2d 816 (1955); Miller v. Miller, 129 Colo. 462, 271 P.2d 411 (1954); Anderson v. Anderson, 124 Colo. 74, 234 P.2d 903 (1951); Emerson v. Emerson, 117 Colo. 384, 188 P.2d 252 (1947).

[10] COLO. REV. STAT. § 43-1-12 (1963).

[11] Harvey v. Harvey, 384 P.2d 265 (Colo. 1963).

[12] Kane v. Kane, 391 P.2d 361, 363 (Colo. 1964).

[13] COLO. R. CIV. P. 35(a) provides: "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician."

[14] 4 MOORE, FEDERAL PRACTICE ¶ 35.03, at 2557 (1963).

[15] Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940).

Rules, is that there is no limitation on the type of action in which the rule may be available.[16]

In a 1951 case, *Richardson v. Richardson*,[17] the Colorado Supreme Court declared that a trial court had authority to require the husband in a divorce proceeding to submit to a mental examination. In *Nelson v. Grissom*,[18] the divorced father contested the remarried mother's petition to remove the children from the state, on the ground that the step-father, due to emotional instability, was unfit to share custody of the children. Since the step-father was out of the state, a mental examination was not ordered for him, but the court *implied* that such an examination could properly have been ordered had he been within the jurisdiction,[19] holding that hospital records pertaining to the step-father's previously conducted psychiatric examination at Colorado Psychopathic Hospital were admissible, if otherwise competent and not privileged, as bearing on the step-father's parental fitness.[20]

The court's correct and liberal interpretation of Rule 35(a) in *Kane* should serve as a reminder to Colorado attorneys that the rule is available in other than personal injury cases.

B. (1) HUSBAND MAY NOT BE REQUIRED TO MAINTAIN LIFE INSURANCE POLICY ON HIS LIFE, FOR WIFE'S BENEFIT, AS PART OF ALIMONY AWARD.

(2) COURT'S ORDER DIVIDING PROPERTY CANNOT REQUIRE THAT PROPERTY ACQUIRED BY HUSBAND AFTER DIVORCE AND PROPERTY SETTLEMENT BE SHARED WITH DIVORCED WIFE.

Two important issues were passed on in *Menor v. Menor*[21] — the first dealt with whether the husband could be ordered to maintain an insurance policy on his own life and the second involved the problem of how to divide property which existed in the form of corporate stock. The Colorado Supreme Court disapproved orders of the trial court in both instances.

In the division of property the husband had been ordered to keep in full force and effect, for his wife's benefit, a $150,000

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[16] 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 821.1, at 478 (1961).

[17] 124 Colo. 240, 236 P.2d 121 (1951).

[18] 152 Colo. 502, 382 P.2d 991 (1963).

[19] The court said, at 152 Colo. 504, "Evidence as to [the step-father's] emotional stability, or lack of it, was certainly material to this issue, even though he was not a party to this litigation." (Emphasis added.)

[20] 152 Colo. at 504.

[21] 391 P.2d 473 (Colo. 1964).

executive protection life insurance policy naming her as sole beneficiary. The general rule is that a court does not have the authority to order involuntary maintenance of an insurance policy to pay future alimony.[22] Alimony is terminated by remarriage of the ex-wife,[23] or the death of the ex-wife or ex-husband,[24] though attempts have often been made to have alimony continue after the death of the ex-husband through voluntary stipulations as to life insurance. If the parties have reached such an agreement by contract, and the contract is incorporated in the divorce decree, its terms may be enforced after the death of either party.[25] Absent this situation, alimony stops with the death of the ex-husband and he cannot be forced to provide for payments after his death through maintenance of a life insurance policy. However, if the policy has a cash surrender value at the time of the divorce, this value may be taken into consideration in a division of property by the court.[26] The court seems to have characterized the trial court's action with respect to the insurance policy purely as an award incident to alimony. Had the court characterized the insurance as aiding in support of the children, would a different result have been reached?

Presumably, part of the proceeds from the insurance policy on the father's life would benefit his three children even though the sole named beneficiary of the policy was the mother of the children. As a general rule in Colorado a father's duty to support his children terminates on the emancipation of the child,[27] or the father's death,[28] and courts are without power, in rendering support orders, to have the father establish an estate payable to his children upon his death.[29] One recent case[30] upheld an order forcing maintenance of an insur-

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[22] See 2 NELSON, DIVORCE § 14.60 (1961).

[23] See COLO. REV. STAT. 46-1-5 (1963) which states that: "[T]he remarriage of the former wife shall relieve the former husband from further payment of alimony to her. . . ."

[24] Doll v. Doll, 140 Colo. 546, 345 P.2d 173 (1959); Elmer v. Elmer, 132 Colo. 57, 285 P.2d 601 (1955); International Trust Co. v. Liebhart, 111 Colo. 208, 139 P.2d 264 (1943).

[25] Magarrell v. Magarrell, 144 Colo. 228, 355 P.2d 946 (1960); *In re* Yoss' Estate, 237 Iowa 1092, 24 N.W.2d 399 (1946); Flicker v. Chenitz, 55 N.J. Super. 273, 150 A.2d 688, (1959), where the court stated:

> "It has been generally held that while the obligation to pay alimony in its technical sense ordinarily terminates upon the death of the husband, yet if he expressly undertakes to pay a stipulated sum . . . and the agreement is approved by the court . . . the provision is enforceable against the estate of the former husband upon his death."

[26] 2 NELSON, DIVORCE § 14, at 126 (1961).

[27] Taylor v. Taylor, 147 Colo. 140, 362 P.2d 1027 (1961).

[28] Doll v. Doll, 140 Colo. 546, 345 P.2d 723 (1959).

[29] Miller v. Miller, 52 Cal. App. 2d 443, 126 P.2d 357 (1942); Elmer v. Elmer, 132 Colo. 57, 285 P.2d 601 (1955); Brown v. Brown, 131 Colo. 467, 283 P.2d 951 (1955); Riley v. Riley, 131 So. 2d 491 (Fla. 1961); Rex v. Rex, 331 Mich. 399, 49 N.W.2d 348 (1951); Mahaffey v. First Nat'l Bank, 231 Miss. 798, 97 So. 2d 756 (1957); Kunc v. Kunc, 186 Okla. 297, 97 P.2d 771 (1939).

[30] Riley v. Riley, 131 So. 2d 491 (Fla. 1961).

ance policy on the theory that it was to be security for the payment of a support order. This case has been strongly criticized however.[31]

The husband owned fifty percent of the stock in a corporation, from which he derived his income. The trial court ordered that present rights in the stock not be disturbed, but that in the event of dissolution of the corporation or sale of the shares, twenty-five per cent of the proceeds from such sale go to the wife and three children and be divided among them equally. The husband objected to awarding the wife an interest in the proceeds of a future possible sale or dissolution of his corporate assets on the ground that this would be an award of the future estate of the father.

Property settlements are based upon the situation of the parties at the time of the decree[32] and are forever binding on the parties.[33] It is necessary to distinguish alimony from property settlement because alimony, by its very nature, must be derived from a future estate and property division must mean to divide property held at the time of division.[34] Courts have a continuing jurisdiction over alimony,[35] which may be increased, decreased, or terminated.[36] The purpose of alimony is to provide support for the former spouse during the uncertain years following the divorce.

In the *Menor* case the order of the trial court as to the shares of stock would have had effect only after the decree of divorce. It could thus not have been a division of property for it would not reflect the situation at the time of the divorce.[37] Nor was it alimony by its very terms. Such an award based on future disposition of the stock would in no way reflect a division of the property as of the date of divorce, since the stock might subsequently appreciate or depreciate in value. The court ordered the value of the stock on the date of the divorce decree ascertained, such valuation properly being the subject of a division of property.

Stanley Lopata

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[31] *Ibid.* (dissenting opinion); 36 TUL. L. REV. 367 (1962).

[32] Stephenson v. Stephenson, 134 Colo. 96, 299 P.2d 1095 (1956); Brown v. Brown, 131 Colo. 467, 283 P.2d 951 (1955); Shapiro v. Shapiro, 115 Colo. 505, 176 P.2d 363 (1947); Gourley v. Gourley, 101 Colo. 430, 73 P.2d 1375 (1937).

[33] Magarrell v. Magarrell, 144 Colo. 228, 355 P.2d 946 (1960); Zlaten v. Zlaten, 117 Colo. 296, 186 P.2d 583 (1947); Low v. Low, 79 Colo. 408, 246 Pac. 266 (1926).

[34] See cases cited note 33 *supra.*

[35] Harris v. Harris, 113 Colo. 41, 154 P.2d 617 (1944); Stevens v. Stevens, 31 Colo. 188, 72 Pac. 1061 (1903).

[36] Elmer v. Elmer, 132 Colo. 57, 285 P.2d 601 (1955), wherein the court held that, "It is fundamental that alimony is subject to modification due to the changed circumstances of the parties, such as marriage, death. . . ."

[37] Brief of Plaintiff in Error, pp. 16-19, Menor v. Menor, 391 P.2d 473 (Colo. 1964).